No. 93-120

In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS JEFFERSON UNIVERSITY, d/b/a
THOMAS JEFFERSON UNIVERSITY HOSPITAL,
PETITIONER

v.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under Medicare regulations, the cost of training programs for interns and residents (known as graduate medical education, or GME, programs) is an "allowable cost" for which a hospital may receive reimbursement. 42 C.F.R. 413.85(a). Reimbursement is not available, however, for any "increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units." 42 C.F.R. 413.85(c).

The question presented is:

Whether the Secretary reasonably determined that 42 C.F.R. 413.85(c) bars a hospital providing Medicare services from obtaining reimbursement of otherwise reimbursable GME program costs that previously were absorbed by its affiliated medical school.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 993 F.2d 879 (Table). The opinion of the district court (Pet. App. 3a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 21, 1993. The petition for a writ of certiorari was filed on July 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the application of a regulation denying Medicare reimbursement to patient care institutions, such as hospitals, of "redistribute[d] costs" that are incurred in connection with a hospital's graduate medical education (GME) program. Pet. App. 10a. The question is whether the Secretary of Health and Human Services reasonably interpreted the regulation as barring reimbursement to a hospital of GME related costs that in previous years had been absorbed by the hospital's affiliated medical school, but are now being claimed by the hospital for reimbursement under Medicare.

2. In Title XVIII of the Social Security Act, Congress established the federally funded Medicare program to provide health insurance to the elderly and disabled. 42 U.S.C. 1395 *et seq.* Part A of the program provides insurance for inpatient hospital and related post-hospital services.[1] From 1966 through 1982, "provider[s] of services" under Part A generally were reimbursed for reasonable and necessary direct and indirect costs related to Medicare-covered patient care. Pet. App. 5a. The reasonable cost calculation generally was based on the "cost[s] actually incurred," as long as the services were necessary. 42 U.S.C. 1395x(v). The Secretary was authorized to issue regulations defining the reimbursement due under this statutory standard. 42 U.S.C. 1395hh, 1395x(v)(1)(A).

[1] Part B is a voluntary supplementary insurance program covering physicians' charges and other medical services. 42 U.S.C. 1395k, 1395*l*, and 1395x(s).

Under the Medicare regulations, the costs of certain educational programs for health professional trainees, including programs for interns and residents known as graduate medical education (GME) programs, are "allowable cost[s]" for which a hospital may receive reimbursement under Medicare Part A. 42 C.F.R. 413.85(a). See also *Ohio State University* v. *Secretary, United States Dep't of Health & Human Services*, 996 F.2d 122, 124 (6th Cir. 1993), *reprinted at* Pet. App. 67a-70a. This category of reimbursable costs includes indirect and overhead costs, and it encompasses expenses directly incurred by a hospital's affiliated medical school in connection with the hospital's GME program for trainees who provide patient care services in the hospital. 42 C.F.R. 413.85(b).[2] Under the Secretary's regulations, GME costs are reimbursable only if they do not represent costs that have been redistributed from educational to patient care institutions. 42 C.F.R. 413.85(c).[3]

[2] For example, the amounts in dispute in this case included salaries, fringe benefits, and the costs of office space and support services for medical school faculty who were housed in and employed directly by the medical school and who participated in the teaching and training of in-hospital trainees. In addition, the hospital attempted to charge Medicare for expenses incurred by the medical school in connection with the admissions and general management of the GME program. Pet. App. 4a n.1.

[3] 42 C.F.R. 413.85(c) provides, in pertinent part:

> Although the intent of the program is to share in the support of educational activities customarily or traditionally carried on by providers * * * , it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units.

In 1983, Congress changed the method of calculating reimbursement by instituting the Prospective Payment System (PPS), which establishes fixed payment rates for various services associated with the inpatient care of program beneficiaries. See Pet. App. 5a. Costs incurred in connection with GME programs were excluded from the PPS scheme and continued to be reimbursed under the old "reasonable cost" system. *Id.* at 5a-6a. In 1986, however, Congress did make a change in the method for reimbursing GME costs by providing that, subject to appropriate updating, the calculation of GME costs to be reimbursed in all subsequent years would be based on the amount of GME costs claimed by the provider for a fiscal year that begins between October 1, 1983 and September 30, 1984 (the base year). 42 U.S.C. 1395ww(h); 42 C.F.R. 413.86(e)(1)(A) (1991).

3. Thomas Jefferson Hospital (the Hospital) is a teaching hospital operated by petitioner, a private not-for-profit educational institution. Pet. App. 8a. The Hospital operates Medicare-approved GME programs for interns and residents. The GME programs are conducted in the Hospital by faculty of petitioner's College of Medicine (the Medical School). *Ibid.*

Since 1974, the Hospital has claimed and received reimbursement for certain categories of costs related to the GME programs. Pet. App. 8a. When the PPS was implemented in 1984, the Hospital reviewed its claims for GME costs to determine whether there were any allowable costs it had not previously claimed. *Id.* at 9a. The Hospital then commissioned a formal cost study on which to base the claim for reimbursement for its 1985 fiscal year. *Ibid.* Anticipating the results of the not-yet-completed study, the Hospital increased its claim for resident and intern costs by $4,000,000 and claimed an additional $2,032,380 in indirect costs that were incurred by the Medical School in connection with its role in administering the Hospital's GME programs. *Id.* at 9a-10a.

4. The fiscal intermediary responsible for determining the Hospital's allowable costs denied reimbursement for most of the new GME-related costs that were claimed by the Hospital for its 1985 fiscal year. Pet. App. 10a. The intermediary explained that the Hospital's claims for reimbursement for the previously unclaimed expenses incurred by the Medical School in connection with the GME programs represented "an improper attempt to redistribute costs from an educational unit to a hospital unit in violation of 42 C.F.R. § 413.85." *Ibid.*

5. On appeal, the Provider Reimbursement Review Board (PRRB) reversed the intermediary's decision and allowed reimbursement of the full costs shown in the cost study. Pet. App. 11a. But the Acting Administrator of the Health Care Financing Administration (on behalf of the Secretary) then modified the PRRB's decision, deciding that the Hospital could receive payment only for "medical education costs which it had traditionally * * * been allowed prior to 1984." *Ibid.*

6. The district court sustained the Secretary's decision. Pet. App. 3a-25a. Adopting a "plain meaning" approach to the anti-redistribution regulation, 42 C.F.R. 413.85(c), the court concluded that reimbursement is available only for "costs associated with the [hospital's GME] program" that "have not been redistributed from an educational institution to a patient care unit." Pet. App. 15a. The court explained

that the regulation's language "evidences Congress' express intent" that the community should bear the costs of medical education programs and that Medicare would "participate appropriately in the support of these activities" only "*until* [] communities undertake to bear these costs." *Id.* at 20a. The court further explained that any interpretation that results in the shifting to the Medicare program of costs traditionally borne by another source—including an educational institution such as a medical school—"would plainly" contradict the purpose of the 1983 revisions of the Social Security Act, which was to "stem[] the spiraling costs of the Medicare program to prevent exhaustion of the fund and achieving a level of budget neutrality." *Ibid.* The court noted that "[i]t is uncontroverted that the excess costs claimed by the Hospital in fiscal year 1985 previously were borne by the Medical School." *Id.* at 22a. The court therefore agreed with the Secretary's conclusion "that the increased claim for reimbursement represents an impermissible redistribution of costs from an educational institution, the Medical School, to a patient care institution, the Hospital." *Ibid.*

The district court rejected, as "in conflict with the plain language of the regulation," the Hospital's argument that the community support and redistribution principles should apply "only to the academic or 'classroom' portions of the Hospital's training programs and not to clinical training programs." Pet. App. 16a. After noting that the training of interns and residents "is predominantly, if not exclusively, clinical in nature," the court stated that "[t]he regulation simply contains no language evidencing an intent to distinguish between academic and clinical

training for purposes of the allowability of the costs claimed." *Id.* at 16a-17a.

7. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

ARGUMENT

The court of appeals, affirming the judgment of the district court, correctly sustained the Secretary's interpretation of the anti-redistribution regulation to deny reimbursement to the Hospital for GME-related costs that had been absorbed by its affiliated medical school in previous years. We nevertheless agree with petitioner that the Court should grant certiorari in this case. The decision below is in conflict with a recent decision of the Sixth Circuit, see *Ohio State University* v. *Secretary, United States Dep't of Health & Human Services*, 996 F.2d 122 (1993), and the question presented is of sufficient importance to warrant this Court's review.

1. The anti-redistribution regulation, 42 C.F.R. 413.85(c), states that costs associated with GME programs in patient care units should ordinarily "be borne by the community," rather than by Medicare. The regulation states, however, that the Medicare program will "participate appropriately in the support of these activities" for communities that have not "assumed responsibility for financing these programs." The regulation goes on to state, however, that "it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units." 42 C.F.R. 413.85(c).

The Secretary interprets the regulation as establishing a distinction between cases in which no entity

in the "community" has undertaken to absorb the costs of medical training programs associated with patient care, and those in which an "educational institution[]"—such as the Medical School in this case—has previously absorbed costs that could otherwise have been (but were not) claimed by the affiliated provider under Medicare. 42 C.F.R. 413.85(c). In the latter case, the payment of Medicare reimbursement for educational program costs that had previously been absorbed by the medical school would constitute a "redistribution of costs" from an educational unit to a patient care institution, in violation of the plain terms of the regulation. *Ibid.*

The district court agreed with the Secretary's conclusion that the regulation "admits of only one interpretation, to wit, if the costs of activities customarily and traditionally carried on by providers in conjunction with their operations have been absorbed by an educational unit, such costs may not later be redistributed to a patient care unit." Pet. App. 21a-22a. Since it is "uncontroverted" in this case that "the excess [GME-related] costs claimed by the Hospital in fiscal year 1985 previously were borne by the Medical School," *id.* at 22a, the court of appeals was correct to affirm the district court's holding that the Hospital was barred under the regulation from receiving Medicare reimbursement for the excess costs at issue.

Even if more than one interpretation of the regulation were possible, however, the result in this case is still correct, because the Secretary's construction of the regulation is, at the very least, reasonable. The Secretary has an explicit mandate to formulate regulations to define what reimbursement is due

under the "reasonable costs" standard. 42 U.S.C. 1395hh, 1395x(v)(1)(A); see *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2158 (1993). Given that mandate, it is axiomatic that the agency must be accorded broad discretion in interpreting and applying its implementing regulation. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (an agency's interpretation of its own regulation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-1176 (1991). See also *University of Cincinnati* v. *Heckler*, 733 F.2d 1171, 1173-1174 (6th Cir. 1984) (deference should be accorded "especially in areas like Medicare reimbursements"); *Butler County Memorial Hosp.* v. *Heckler*, 780 F.2d 352, 356 (3d Cir. 1985); *Abbott-Northwestern Hosp., Inc.* v. *Schweiker*, 698 F.2d 336, 340 (8th Cir. 1983); *Cheshire Hosp.* v. *New Hampshire-Vermont. Hosp. Serv.*, 689 F.2d 1112, 1117 (1st Cir. 1982).[4]

2. Although the decision of the court of appeals is correct, we agree with petitioner that the Court should grant certiorari in this case. The court of appeals' decision conflicts with the Sixth Circuit's recent decision in *Ohio State University* v. *Secre-*

[4] Contrary to petitioner'ssuggestion (Pet. 15-16), the Secretary's recent proposal to amend 42 C.F.R. 413.85 to include a definition of the phrase "redistribution of costs" as it appears in Section 413.85(c), see 57 Fed. Reg. 43,660, 43,672 (1992), effects no change in the meaning or operation of the regulation. On the contrary, as stated in the preamble to the proposed amendment, its purpose is to "restate or clarify our current policies governing these costs." *Id.* at 43,660.

tary, United States Dep't of Health & Human Services, 996 F.2d 122 (1993). In that case, a teaching hospital affiliated with a university medical school sought Medicare reimbursement for expenses incurred in 1985 for the operation of its GME training programs. The Sixth Circuit held that even where the disputed GME costs previously had been borne by the medical school, reimbursement for those costs would not violate the prohibition on redistribution in 42 C.F.R. 413.85(c) as long as the costs were related to patient care. 996 F.2d at 124. The court construed the proscription against redistribution as not applying to "educational activities customarily or traditionally carried on by providers in conjunction with" patient care activities, but as covering only "redistribution of costs from an educational program, such as classroom expenses, to a provider of Medicare medical services." *Ibid.* Because the Sixth Circuit ordered Medicare reimbursement for GME expenses that had not previously been claimed by the Medicare provider, the decision in *Ohio State* directly conflicts with the decision in the instant case.[5]

Furthermore, the proper interpretation of the Secretary's anti-redistribution regulation presents an important and recurring issue that has a major fiscal impact on the administration of the Medicare program. According to the Department of Health and Human Services, at least ten university teaching hospitals have filed claims for Medicare reimburse-

[5] The Solicitor General accordingly has determined that a petition for a writ of certiorari will be filed in *Ohio State*, with the suggestion that the petition be held pending disposition of this case. The certiorari petition in *Ohio State* is due on November 2, 1993.

ment for GME program-related costs incurred in their base year[6] and in later years. Claims for more than $116 million for services provided from 1985 through the early 1990's by seven teaching hospitals are currently pending before the Provider Reimbursement Review Board. Each of those institutions could have additional unaudited claims for more recent periods. In addition, approximately $29 million in claims are at issue in cases already decided by, or pending, before the courts of appeals, including $3.5 million in this case for services provided through 1989, and $6 million in *Ohio State* for services provided through 1991.[7] Finally, HHS has determined that there are between 15 and 20 more university-affiliated patient care institutions that would be eligible to submit additional claims for GME-related expenses incurred in their base year and in subsequent years. In sum, resolution of the legal issue in this case is important because it will determine the disposition of pending Medicare

[6] As explained above, Congress in 1986 changed the method for reimbursing GME costs by providing that, subject to appropriate updating, the calculation of GME costs to be reimbursed in all subsequent years would be based on the amount of GME costs claimed by the provider for its fiscal year beginning between October 1, 1983 and September 30, 1984 (the base year). 42 U.S.C. 1395ww(h).

[7] Medicare claims totalling approximately $19 million for GME services provided by a teaching hospital affiliated with the University of Minnesota from 1985 through 1990 are potentially at issue in *Board of Regents of The University of Minnesota* v. *Shalala*, appeal pending, No. 93-2420 (8th Cir.), which presents the same question of the interpretation and application of the anti-redistribution regulation that is at issue in this case.

reimbursement claims involving, to date, $150 million dollars and will have a continuing and substantial impact on future claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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